No. 87-792

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EDEN SERVICES, a Maryland Partnership,
FRED J. EDEN, JR., and J. ERIK EDEN,
Petitioners,

v.

RYKO MANUFACTURING CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONERS' REPLY BRIEF

Of Counsel:
ROBERT T. HAAR
KOHN, SHANDS, ELBERT, GIANOULAKIS AND GILJUM
411 North Seventh Street
St. Louis, MO 63101
(314) 241-3963

DAVID OVERLOCK STEWART
(Counsel of Record)
JONATHAN B. SALLET
DAVID I. GELFAND
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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As demonstrated in the brief of the Amici States, this case raises important issues concerning the Sherman Act's restrictions on the power of manufacturers to limit the resale price and distribution of their products, and the decision of the court of appeals conflicts with other rulings. Rather than address these significant questions, respondent offers primarily factual assertions.

1. Respondent essentially ignores the argument that the court of appeals stretched beyond recognition the holding in *Copperweld Corp. v. Independence Tube Corp.*, 467

U.S. 752 (1984). Ryko notes only that the court of appeals did not expressly cite *Copperweld*. Ryko Br. at 11. But the court of appeals relied entirely on *Pink Supply Corp. v. Hiebert*, 788 F.2d 1313, 1316-18 (8th Cir. 1986), in ruling that an agent lacks capacity "to engage in an antitrust conspiracy with its corporate principal." Pet. App. 11a. *Pink Supply* was based entirely on a misapplication of *Copperweld*. Thus, that distortion of *Copperweld* lies at the heart of the Eighth Circuit's holding that an agent and its principal cannot combine to violate the Sherman Act.

Without any supporting citation, respondent claims that there is a "consistently recognized rule that an agent lacks legal capacity under section 1 of the Sherman Act to conspire with its corporate principal." Ryko thus ignores this Court's decision in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), finding an illegal combination under the Sherman Act between a newspaper and its agent. Two other courts of appeals recently refused to recognize the "rule" claimed by Ryko. *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir. 1986) (airline and its agents "not the same firm for purposes of *Copperweld*"); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 214 (D.C. Cir. 1986) (*Copperweld* inapplicable to moving company and its agents); *see* Pet. at 14.

Indeed, if there were a rule that agents and their principals cannot conspire under the Sherman Act, then the question decided in *Copperweld* would never have arisen. Why decide in *Copperweld* whether a parent corporation can conspire with its wholly-owned subsidiary if Ryko is correct that no agent and principal can conspire under the Sherman Act? The Eighth Circuit's holding conflicts with *Copperweld* and other lower court decisions, and this Court should address that conflict.

2. The Petition's second question presented concerns the need to clarify *Simpson v. Union Oil Co.*, 377 U.S.

13 (1964). In opposition, Ryko offers the factual argument that Eden was Ryko's "agent" and thus no resale price maintenance could have occurred.[1] But Ryko fails to distinguish other decisions—especially *Simpson*—that are contrary to the ruling below.

For example, the distributor in *Bostick Oil Co. v. Michelin Tire Co.*, 702 F.2d 1207 (4th Cir.), *cert. denied*, 464 U.S. 894 (1983), was not found to be an agent of the manufacturer, even though the national account customers were billed directly by the manufacturer, *id.* at 1212, and many shipments were sent directly to the customers, with the distributor never taking possession of the goods, *id.* at 1210. These are precisely the factors considered by the court of appeals in concluding that Eden was Ryko's agent, yet Ryko cannot explain how the program in *Bostick Oil* differed from Ryko's national account system. *See* Ryko Br. at 15, n.8.

Ironically, Ryko attempts to distinguish *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976), on grounds expressly re-

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[1] According to Ryko, "[t]he conclusion that Eden functioned as an agent on national account sales is based upon *uncontroverted* facts in the record." Ryko Br. at 13 (emphasis added). But Ryko ignores the many contrary facts stated in the Petition and the brief of the Amici States—most importantly, the distributorship contract itself which was drafted by Ryko and provides that Eden is *not* "the agent or legal representative of [Ryko] for any purpose whatsoever." *See* Amicus Br. at 9-10. Those many facts—Eden's exposure to risk caused by price fluctuations, Eden's complete risk of loss on sight draft sales and partial risk of loss on purchase order sales, Eden's complete risk of damage during shipping, and Eden's warranty obligations—demonstrate that Eden was an independent entrepreneur. *Id.* at 9-12.

Ryko now claims that one sight draft sale to Jiffy Lube was not actually made on national account terms. Ryko Br. 16, n.10. In fact, Eden was required by Ryko to sell to Jiffy Lube at the national account price, *see* Pet. App. 75a, and Eden thus was forced to make this sight draft sale at the national account price, which it did.

jected by the Fifth Circuit and by General Foods itself. Thus, Ryko emphasizes that the distributor in *Greene* "owned and held title to the goods" involved. Ryko Br. at 14. General Foods argued that it could have retained title to those goods involved, but insisted that if such a formalistic device conferred immunity from the Sherman Act, then the law would "turn on meaningless technicalities." 517 F.2d at 657. The Fifth Circuit added, "We agree." *Id.* Unfortunately, both Ryko and the Eighth Circuit would permit evasion of the Sherman Act through the employment of just such meaningless technicalities. *Compare Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 59 (1977) (rejecting as "formalistic line drawing" an earlier ruling that application of *per se* rule turned on whether distributor took title to goods).[2]

And Ryko never even attempts to reconcile the ruling below with *Simpson*. In purporting to apply *Simpson*, the court below—like several other courts—plainly abandoned the antitrust policy vindicated by *Simpson*. The Amici States cogently explain the resulting confusion and damage to public and private antitrust enforcement. Amicus Br. at 13-18. This Court should grant certiorari to address this important issue.

3. Ryko's argument on its exclusive territories restriction depends entirely on characterizing that restriction as a *vertical* restraint. But Ryko's arrangement with other distributors does not become vertical simply because Ryko claims to have acted only as a manufacturer.

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[2] Ryko also points out that the distributor in *Greene* stored the goods involved (coffee) prior to delivering them to the national account customer, Ryko Br. at 14, while Eden ordinarily did not store the $20,000 car wash machines made by Ryko. This distinction is due entirely to the difference between products. A commodity like coffee is routinely kept in inventory by distributors, while a big-ticket item like a car wash machine is built to order and delivered directly to the purchaser. That distinction in products cannot establish whether Eden was or was not an independent business under *Simpson*.

Ryko incontestably participates in the market at two levels—as manufacturer and as distributor—and cannot escape the horizontal nature of its exclusive territories restriction by ignoring its dual role. *See United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).[3]

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[3] At two points, Ryko fundamentally mischaracterizes the Petition. *First*, Ryko states that Eden does not challenge the "appellate finding" that Eden failed to show a " 'conscious commitment to a common scheme designed to achieve an unlawful objective.' " Ryko Br. at 17 (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)). The court of appeal's error on this point is the subject of the Petition's first two questions presented.

Second, Ryko states that "Eden has not even appealed from the Court of Appeals decision that the territorial arrangement is not unreasonable," and that "Eden has conceded that the territorial provision . . . was not 'the result of a distributors' cartel.' " Ryko Br. at 19. The Petition argues that Ryko's territorial restriction should be *per se* illegal as a horizontal restraint on trade and therefore is unreasonable. Because the territorial restriction was not initiated by distributors other than Ryko, it did not develop from a classic cartel structure. But because the restriction primarily protects Ryko as distributor from competition by distributors like Eden, it operates as a horizontal restraint and should be held *per se* illegal.

Finally, Ryko has included certain inflammatory remarks without citation to the record or supporting explanation. The most prominent example is the assertion that "Fred Eden, a lawyer by training, lied under oath on two occasions." Ryko Br. at 6. Even if that assertion were true, it would involve only a question of credibility already decided by a jury which ruled against Ryko on every one of the nine claims that it decided, including a finding that Ryko committed fraud.

CONCLUSION

For all of the reasons stated above and in the Petition for Certiorari, this Court should grant Eden's Petition for Certiorari.

Respectfully submitted,

Of Counsel:
ROBERT T. HAAR
KOHN, SHANDS, ELBERT, GIANOULAKIS AND GILJUM
411 North Seventh Street
St. Louis, MO 63101
(314) 241-3963

DAVID OVERLOCK STEWART
(Counsel of Record)
JONATHAN B. SALLET
DAVID I. GELFAND
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorneys for Petitioners

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